The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON; et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE; et al., Defendants.	NO. 2:20-cv-00111-RAJ PLAINTIFF STATES' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT NOTED ON MOTION CALENDAR: April 16, 2021[1] ORAL ARGUMENT REQUESTED

[1] The briefing schedule for these cross-motions is governed by the Minute Order at Dkt. # 114.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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(206) 464-7744

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Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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I. INTRODUCTION

This case addresses the renewed threat that computer files for the production of 3-D-printed firearms (3-D firearms files) will proliferate worldwide through global export and publication on the internet. The stakes are high: as Defendants acknowledge, allowing global dissemination of these files would seriously and permanently compromise national security and public safety. There is no dispute that the files enable undetectable, untraceable, deadly weapons to be printed practically at the push of a button. Currently, as a result of this Court's preliminary injunction, 3-D firearms files remain on the U.S. Munitions List (USML)[2] and are subject to meaningful export control by the State Department (State). But if jurisdiction is transferred to the Commerce Department (Commerce) under the challenged regulations (the State and Commerce Rules, respectively), gaping loopholes in Commerce's jurisdiction will enable the global proliferation of these weapons. This is because Commerce will only retain jurisdiction over published 3-D firearms files in formats "such as AMF or G-code" that are "ready for insertion" into a 3-D printer or similar device. By contrast, the agency will lack jurisdiction over all other 3-D firearms files—including those that are not "ready for insertion," but can be swiftly converted to an "insertable" format using readily available software. And Commerce will lack jurisdiction over 3-D firearms files that have already been "published"—including specific files for functional weapons previously published online by the "crypto-anarchist" Defense Distributed organization.

The loophole-riddled provision for regulating 3-D firearms files under the Commerce Rule, 15 C.F.R. § 734.7(c) ("Subsection (c)"), was never disclosed to the public in any form before final publication, contravening the APA's fundamental notice-and-comment requirements. The record is devoid of any information directly related to the development of Subsection (c): there is *no* documented factual or policy basis for the specific language used in that provision. Because Subsection (c) was never tested through notice-and-comment, and was seemingly pulled from thin air by agencies with no special expertise in 3-D printing technology, Defendants failed

[2] Plaintiffs adopt the abbreviations in Defendants' Table of Abbreviations, Dkt. # 110 ("Mot.") at ix.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

to consider its obvious flaws and shortcomings. Not only that, but the proposed rules published in the Federal Register claimed to affect only "commercial" items and gave no indication whatsoever of their sweeping effect on the regulation of 3-D firearms files. The public was notified of proposed changes to a broad array of export-controlled items—but was *not* notified that these changes would implicate 3-D firearms files until it was too late to comment.

Defendants' attempts to avoid judicial review are meritless. The jurisdictional exemptions they cite are inapplicable, as the Court has already preliminarily found. And the States' safety interests fall squarely within the zone of interests under the Arms Export Control Act (AECA), 22 U.S.C. § 2778. This Court has the authority and the duty to review the decision to remove 3-D firearms files from the Munitions List so as to practically guarantee global dissemination.

II. STATEMENT OF UNDISPUTED FACTS

A. Statutory and Regulatory Background

1. State Department: The AECA and ITAR

The AECA authorizes the President, "[i]n furtherance of world peace and the security and foreign policy of the United States ... to control the import and the export of defense articles and defense services." 22 U.S.C. § 2778(a)(1). Items designated as defense articles and services "constitute the United States Munitions List," *id.*, which is maintained by the State Department. *See* USML, 22 C.F.R. § 121.1 (2017). Category I of the USML consists of "Firearms and Related Articles," including "technical data" for certain firearms.[3] 22 C.F.R. § 121.1 (Category I(i)). Until recently, Category I included "nonautomatic and semi-automatic firearms to caliber .50 inclusive" and related technical data. 22 C.F.R. § 121.1 (Aug. 30, 2019) (amended Mar. 9, 2020). Under the State and Commerce Rules, most nonautomatic and semi-automatic firearms no longer appear on the USML. *Compare id. with* 22 C.F.R. § 121.1 (Category I(b)). But under the narrow terms of this Court's injunction, 3-D firearms files currently remain on the USML. State controls

[3] "Technical data" includes "[s]oftware ... directly related to defense articles" and information "required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles ..." 22 C.F.R. § 120.10.

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Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

these items under regulations known as the International Traffic in Arms Regulations (ITAR). *See* 22 C.F.R. §§ 120–130 (2016). State does not have unfettered discretion: for example, when removing an item from the Munitions List, State must notify Congress at least 30 days in advance, 22 U.S.C. § 2778(f)(1), and must account for the AECA's objectives, i.e., furthering "world peace and the security and foreign policy of the United States," 22 U.S.C. § 2778(a)(1); *see Washington v. State*, 420 F. Supp. 3d 1130, 1140, 1144–47 (W.D. Wash. 2019), *appeal dismissed sub nom. State v. DD*, 20-35030, 2020 WL 4332902 (9th Cir. July 21, 2020).

2. Commerce Department: The ECRA and EAR

The Export Control Reform Act (ECRA) authorizes the President to regulate the export, reexport, and in-country transfer of certain commodities, software, and technology. 50 U.S.C. §§ 4801(7), 4812. Unlike the AECA, the ECRA is not limited to munitions, but covers a broad array of commercial items. The Commerce Secretary is charged with maintaining a list of ECRA-controlled items, known as the Commerce Control List (CCL). 50 U.S.C. § 4813. These items are regulated under the Export Administration Regulations (EAR). 15 C.F.R. chapter VII, subchapter C. Under the ECRA, a license is required to export items controlled under the EAR only in limited circumstances, such as exports to terrorism-supporting countries, or exports of nuclear weapons, missiles, and chemical or biological weapons. 50 U.S.C. § 4813(c), (d).

Crucially, "published" technology and software are not subject to the EAR. 15 C.F.R. §§ 734.3(b)(3), 734.7(a). Thus, when technology or software "has been made available to the public without restrictions upon its further dissemination," Commerce lacks jurisdiction to control its export. 15 C.F.R. § 734.7(a). In contrast to the ITAR, "publication" under the EAR can occur without government pre-approval or pre-authorization. *Compare* 15 C.F.R. § 734.7(a) (no pre-approval required to "publish" EAR-controlled items) *with* 22 C.F.R. §§ 120.10(b), 120.11(a)(7) (pre-approval required to place ITAR-controlled items into the "public domain").[4]

[4] *See also* 80 Fed. Reg. 31,528 (Jun. 3, 2015) (International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain) (State has long required "a license or other authorization ... to release ITAR controlled 'technical data'" into the public domain).

Moreover, while the ITAR require any exporter of Munitions List items to register with State, *see* 22 C.F.R. § 122.1(a), the EAR contain no similar requirement.

B. The Regulation and Attempted Deregulation of 3-D Firearms Files

1. Defense Distributed's 3-D firearms files are ITAR-controlled

Since at least 2013, State has maintained 3-D firearms files on the USML and restricted their export under the ITAR. In 2012, a private organization, Defense Distributed (DD), posted computer-aided design (CAD)[5] firearms files on its website. *DD v. State*, 838 F.3d 451, 455 (5th Cir. 2016), *cert. denied*, 138 S. Ct. 638 (2018). The company's stated objective is to facilitate unrestricted access to firearms worldwide and to evade gun safety laws. Ex. B.[6] To create a functional weapon within hours or minutes, a user would typically need only download the files, use commonly available software to convert and transmit the files to a 3-D printer, and enter a print command. Dkt. # 56 at 3–4 (Patel Decl. ¶¶ 10–14). State promptly notified DD that its website posting constituted an unlawful export under the AECA and the ITAR, and requested that DD remove ten specific CAD files "immediately." Ex. D, ¶¶ 24–25 & Ex. 2. DD complied, and thereafter submitted commodity jurisdiction requests seeking further review. *Id.*, Exs. 3, 4. In 2015, State determined that six categories of DD's CAD files were Category I technical data subject to ITAR control, noting that the files could be used to "automatically find, align, and mill" defense articles using a 3D printer. *Id.*, Exs. 5, 6.

2. The State Department settles Defense Distributed's lawsuit

In 2015, DD sued State over State's regulation of the CAD files. *DD v. State*, No. 15-CV-372 RP (W.D. Tex.). In defending that lawsuit, State said it was "particularly concerned that [the] proposed export of undetectable firearms technology could be used in an assassination, for the manufacture of spare parts by embargoed nations, terrorist groups, or guerrilla groups, or to compromise aviation security overseas in a manner specifically directed at U.S. persons." Ex. E

[5] CAD files are design files, whereas computer-assisted manufacturing (CAM) files provide the manufacturing or tool paths that perform 3-D printing operations. Dkt. # 56 at 3, ¶¶ 10–12.

[6] Unless otherwise indicated, lettered exhibits are to the Declaration of Kristin Beneski filed herewith.

at 10. State explained that, "absent such regulation" of DD's CAD files, "providing the CAD designs to a foreign person or foreign government would be equivalent to providing the defense article itself, enabling the complete circumvention of ITAR's export regulations." *Id.* at 7.

During the litigation, State submitted the declaration of Lisa V. Aguirre, then the Director of the Office of Defense Trade Controls Management. Director Aguirre testified that: (i) "[t]he 'Liberator' firearm included in DD's CAD designs presents a specific and unique risk to the national security and foreign policy interests of the United States"; (ii) making the CAD files available online would provide terrorist organizations with firearms, which could be used against the United States or its allies; and (iii) "[a]ccess to weapons technology coupled with the uncontrolled and increasingly ubiquitous means of production … could contribute to armed conflict, terrorist or criminal acts, and seriously undermine global export control and non-proliferation regimes designed to prevent the dangerous and destabilizing spread and accumulation of weapons and related technologies." Ex. D, ¶ 35(c). The district court denied DD's motion for a preliminary injunction, and the Fifth Circuit affirmed, stating:

> Even if Plaintiffs-Appellants eventually fail to obtain a permanent injunction, the files posted in the interim [if a preliminary injunction issued] would remain online essentially forever, hosted by foreign websites such as the Pirate Bay and freely available worldwide …. ***Because those files would never go away***, a preliminary injunction would function, in effect, as a permanent injunction as to all files released in the interim. ***Thus, the national defense and national security interest would be harmed forever***.

DD v. State, 838 F.3d at 460 (emphases added).

In April 2018, State moved to dismiss DD's lawsuit, arguing that its CAD files "can unquestionably facilitate the creation of defense articles abroad" and that "State has consistently and reasonably concluded that it is not possible to meaningfully curtail the overseas dissemination of arms if unfettered access to technical data essential to the production of those arms is permitted." Ex. C at 3, 7. If it did not regulate the CAD files' export, State told the court, they could be "easily used overseas to make firearms that are subject to U.S. export controls," where, "beyond the reach of U.S. law, they could be used to threaten U.S. national security, U.S.

foreign policy interests, or international peace and stability." *Id.* at 1.

However, while its motion to dismiss was pending, State abruptly settled with DD. *See* Ex. F (Settlement Agreement signed Jun. 29, 2018). The Agreement's terms were not publicly disclosed in time for the public to comment on them. *See Washington*, 420 F. Supp. 3d at 1138. This lawsuit arises from State's actions pursuant to the Settlement Agreement.

3. The State Department acts to fulfill the Settlement Agreement

a. The Settlement Agreement's terms

In the Settlement Agreement, State agreed to permit exports of "the technical data that is the subject of the Action," which includes files DD "has and will continue to create and possess" in the future. Ex. F at 1, 7–8; Ex. G, ¶¶ 25, 36, 40, 44–45. Specifically, State committed to: (1) issue a new rule revising USML Category I with the effect of excluding DD's 3-D firearms files, and (2) while that rule was in development, issue a temporary modification and letter allowing DD to publicize the subject files in any form, exempt from ITAR. Ex. F at 1–2.

b. The NPRMs do not mention 3-D firearms files

On May 24, 2018, State and Commerce took the first steps to fulfill the Settlement Agreement by publishing two companion notices of proposed rulemaking (NPRMs). The NPRMs would remove all Category I items from the USML and transfer regulatory jurisdiction to Commerce. *International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III*, 83 Fed. Reg. 24,198 (May 24, 2018) (State NPRM); *Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)*, 83 Fed. Reg. 24,166 (May 24, 2018) (Commerce NPRM).

According to the State NPRM, small-caliber firearms do not "provide the United States with a critical military or intelligence advantage," primarily because they are "widely available in retail outlets in the United States and abroad." State NPRM at 24,198. Therefore, the State NPRM proposed to transfer jurisdiction over non-automatic firearms up to .50 caliber, and related technical data, to Commerce. *Id.* The State NPRM did not mention 3-D firearms files. *See id.*

Such files—which cannot be lawfully posted on the internet and have a purpose of facilitating the creation of illegal, undetectable weapons—are not "commonly commercially available." *See* Ex. H at 32:16–21; Ex. I at 7–8. The Commerce NPRM, published the same day, likewise described the transferred items as "essentially commercial items widely available in retail outlets and less sensitive military items." *Id*.; *see also* Mot. at 4 (jurisdictional transfer was motivated by belief that the transferred items are "commonly available worldwide"). The Commerce NPRM claimed that the proposed rule "does not deregulate the transferred items." *Id*. And it claimed that the exception for "published" information applies in a "well-established and well understood" manner, citing the example of a "firearm's operation and maintenance manual." *Id.* at 24,167. Like the State NPRM, the Commerce NPRM did not mention 3-D firearms files at all.

Defendants never notified the public of the Settlement Agreement, which required the NPRMs' publication and reveals their connection to 3-D firearms files. Nevertheless, some subject-matter experts realized that the very broad category of "technical data" related to Category I items included 3-D firearms files. Ex. J at 5–7 (citing Exs. K, L). Those commenters opposed the proposed rule, pointing to the EAR's "publication" loophole. *See id.* Once the comment period closed, details of the Settlement Agreement became public. *Washington*, 420 F. Supp. 3d at 1138. State then received over 106,000 emails in a week from concerned members of the public, as well as multiple letters from members of Congress and public policy organizations, urging reconsideration. Ex. J at 2–3, 7–8. These technically late comments "were not considered by the agency" when it issued the temporary modification and letter pursuant to the Settlement Agreement. *Washington*, 420 F. Supp. 3d at 1138.

c. This Court vacates the temporary modification and letter

On July 27, 2018, the Government took the next steps to fulfill the Settlement Agreement by publishing the temporary modification removing 3-D firearms files from the USML and issuing the letter authorizing their unlimited distribution. *Washington*, 420 F. Supp. 3d at 1138. DD then posted a number of 3-D firearms files on its website. *See* Case No. 2:18-cv-01115-RSL,

Dkt. # 63 at 6 ("Defense Distributed shared ten subject files" on July 27, 2018).

A coalition of twenty states sued and obtained a temporary restraining order, which the district court later converted to a preliminary injunction. *Washington v. State*, 315 F. Supp. 3d 1202 (W.D. Wash. 2018) (TRO); *Washington v. State*, 318 F. Supp. 3d 1247 (W.D. Wash. 2018) (PI). State complied with the injunction by rescinding the temporary modification and letter, and DD promptly removed its 3-D firearms files from its website. Ultimately, the court granted summary judgment to the Plaintiff States and vacated the temporary modification and letter. *Washington*, 420 F. Supp. 3d 1130. The Government did not appeal.[7]

d. 15 U.S.C. § 734.7(c) is added at the eleventh hour

In early 2020, the Government took the last step to fulfill the Settlement Agreement by publishing the final State and Commerce Rules. As described below, the State Rule transfers jurisdiction of Category I items to Commerce, while the Commerce Rule adds never-before-seen provisions specific to 3-D firearms files by amending 15 U.S.C. § 734.7 to add Subsection (c). Commerce Rule at 4172–73; *see also* Dkt. # 1-3.

The administrative record, produced in September 2020 (Dkt. ## 106–107, 109), reveals that Subsection (c) was added to the draft Commerce Rule in late 2019. An October 2019 internal memorandum to former Secretary Pompeo states that the Administration will submit a "new notification" to Congress that "will include Commerce controls on the publication of 3D-printed firearm files (i.e., computer files that enable a 3D printer to produce components of an operable firearm) under its regulations." Ex. M. That notification was sent on November 12, 2019. Ex. N. Subsection (c) was *never* disclosed to the public before its final publication.

C. The Final Rules

Defendants published the final State and Commerce Rules on January 23, 2020. As proposed, the State Rule removes small-caliber firearms and related technical data from the

[7] Defense Distributed and other private defendants appealed the final judgment to the Ninth Circuit (consolidated Case Nos. 20-35030 & 20-35064). Those appeals were dismissed on July 21, 2020.

Munitions List. State Rule at 3823. The Commerce Rule provides that the removed items are added to the Commerce Control List and subject to EAR controls. Commerce Rule at 4173. The "combined effects" of these "companion rule[s]" is to "transfer" 3-D firearms files (and a host of other items) from the USML to the Commerce Control List. State Rule at 3820.

Unlike the NPRMs, the final rules expressly address 3-D firearms files. The Commerce Rule's preamble recognizes that "plaintiffs in *Washington v. Dep't of State* raised concerns about risks to public safety" if 3-D firearms files were released on the internet, and that Commerce "shares the concerns raised over the possibility of widespread and unchecked availability of the software and technology internationally, the lack of government visibility into production and use, and the potential damage to U.S. counter proliferation efforts." Commerce Rule at 4141. It further recognizes that "[i]n the absence of [export] controls ... [3-D firearms files] could be easily used in the proliferation of conventional weapons, the acquisition of destabilizing numbers of such weapons, or for acts of terrorism." *Id.* at 4140. State "agrees with ... Commerce" that controlling the export of 3-D firearms files "remains in the national security and foreign policy interests of the United States." State Rule at 3823.

Unlike the NPRMs, the final rules purport to address the "publication" loophole as applied to 3-D firearms files. Whereas typically, "published" items are an exception to Commerce's EAR jurisdiction, the Commerce Rule creates an exception to the exception by adding the new Subsection (c) to 15 C.F.R. § 734.7. Subsection (c) provides in full:

> The following remains subject to the EAR: "software" or "technology" for the production of a firearm, or firearm frame or receiver, controlled under ECCN 0A501, that is made available by posting on the internet in an electronic format, such as AMF or G-code, and is ready for insertion into a computer numerically controlled machine tool, additive manufacturing equipment, or any other equipment that makes use of the "software" or "technology" to produce the firearm frame or receiver or complete firearm.

15 C.F.R. § 734.7(c). Notably, Subsection (c) permits the export of published 3-D firearms files by any means *other than* internet posting. *See id.* And it only retains jurisdiction over file formats that are "ready for insertion" into manufacturing equipment, such as a 3-D printer. *See id.* 3-D

firearms files in other common formats (some of which are readily convertible to AMF or G-code) are not covered by Subsection (c) and can be freely posted online. *See id.* In short, published 3-D firearms files are not subject to EAR export controls *unless* they fall under Subsection (c)'s narrow exception to the exception. *See id.* The administrative record contains no indication that Defendants analyzed or reviewed any information related to the scope or meaning of the terms "AMF," "G-code," or "ready for insertion," or that Defendants analyzed the differences between regulation of 3-D firearms files under the USML and ITAR versus under Subsection (c) and EAR. *See* Beneski Decl. ¶¶ 4–6.

D. Procedural History

On March 6, 2020, this Court preliminarily enjoined Defendants from implementing or enforcing the State Rule "insofar as it alters the status quo restrictions on technical data and software directly related to the production of firearms or firearm parts using a 3D-printer or similar equipment." Dkt. # 94 (PI Order) at 22. The next day, Defendant DDTC notified the public that 3-D firearms files remained on the Munitions List. Ex. O. On April 2, 2020, Commerce published in the Federal Register a "Notification of court order" likewise indicating that 3-D firearms files remain under State's export-control jurisdiction. 85 Fed. Reg. 18,438 (Apr. 2, 2020).

III. ARGUMENT

A. Legal Standard

Under the APA, courts "shall ... hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Where the material facts are not genuinely disputed and the questions before the Court are purely legal, the Court can resolve an APA case on a motion for summary judgment. Fed. R. Civ. P. 56; *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010)).

"[I]n APA cases, the Court's role is to determine whether, as a matter of law, evidence in the administrative record supports the agency's decision." *King County v. Azar*, 320 F. Supp. 3d 1167, 1171 (W.D. Wash. 2018) (citing *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th

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Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Cir. 1985)). Review is based on "the whole record," 5 U.S.C. § 706, which "consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Courts may also consider extra-record evidence for background and when necessary to determine whether the agency has considered all relevant factors and explained its decision. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

B. Defendants' Actions Will Permit Uncontrolled Dissemination of 3-D Firearms Files

Subsection (c) of the Commerce Rule establishes the means by which Commerce would regulate—or rather, fail to regulate—published 3-D firearms files after their removal from the Munitions List. This Court correctly found that it may "evaluate joint actions to the extent that they are reflected in [State's] decision to remove the 3-D gun files from the Munitions List," PI Order at 11, as Subsection (c)'s limited retention of jurisdiction is central to State's asserted rationale for removing the files from the Munitions List. *See* State Rule at 3823 (State "agrees with ... Commerce" that controlling the export of 3-D firearms files "remains in the national security and foreign policy interests of the United States."). Subsection (c)'s loopholes are the reason the de-listing amounts to a deregulation that harms the States. These loopholes include:

First, Commerce will only retain jurisdiction over published files in formats "such as AMF or G-code" that are "ready for insertion" into a 3D printer or similar device.[8] But it will lack jurisdiction over files that can be converted to such formats using commonly available 3D-printing software (such as CAD design files). 15 C.F.R. § 734.7(c); *see* PI Order at 17 n.5. But anyone could post CAD design files online, along with a link to free software that could promptly convert the files into a machine-readable format. This gaping loophole will result in widespread,

[8] "Ready for insertion" is undefined, and its meaning is not entirely clear. For example, it is not clear whether files that can be "inserted" into 3D printing *software* fall under Subsection (c), or whether it only covers files that can be "inserted" into 3D printing hardware ("equipment"). 15 C.F.R. § 734.7(c). Importantly, if the transfer is allowed to go forward, Commerce will have unreviewable discretion to interpret, modify, or rescind Subsection (c). *See* 50 U.S.C. § 4821(a).

easy access to downloadable guns with no restrictions. This is no idle threat. Some of DD's export-controlled files—including technical data for assault rifles—were in CAD file formats that are *not* "ready for insertion," but can be easily converted into an "insertable" format. *See* Dkt. # 56 at 5, ¶ 20.[9] DD could also de-convert its insertable files into a non-insertable format and post them online with instructions for converting them back into insertable files. *See* 15 C.F.R. § 734.7(c). Defendants argue that the "ready for insertion" language "provides Commerce the flexibility to address *future changes* in technology," Mot. at 22 (emphasis added), but this is cold comfort since convertible files already exist.

Defendants' prior submissions to the Court effectively concede that Commerce sought to exempt some types of 3-D firearms files from its jurisdiction, without ever directly telling the public this information. In particular, the Declaration of Matthew Borman (Dkt. #85-2) implies that only Computer Aided *Manufacturing* (CAM) files are intended to be covered by the "ready for insertion" language. *See* Dkt. #85-2 at 19, ¶ 46 (describing AMF and G-Code as CAM files). Mr. Borman likewise states that only files with what he describes as a "functional capability" are exempted from the publication exception, because Commerce—apparently crediting the unsuccessful argument DD made in its litigation against State—concluded that controlling other file types currently controlled under ITAR, such as CAD files, would raise First Amendment concerns. *Id.* ¶ 48. Defendants' purported concerns were never disclosed for public comment, nor was the possibility of delineating between file types. As the Plaintiff States' expert has explained, CAD and CAM files are separate file types, but the former can easily be converted to the latter using free, widely-available software. Dkt. # 56 at 4–5, 8 (Patel Decl. ¶¶ 12–14, 28). At least some if not all of the files DD sought to make widely available were CAD files, not CAM files, including designs for assault rifle weapons. *See id.* at 3–4 (Patel Decl. ¶¶ 15–20). But, due to the ease of conversion, there is little point in controlling CAM files without controlling CAD files.

[9] *See also DD v. Grewal*, 3:19-cv-04753 (D.N.J.), Dkt. #1-40, ¶ 5 (Feb. 5, 2019) (DD's Director stating company's 3-D firearms files include CAD files from SoLiDworks, STEP, and SketchUp).

Second, in contrast to the ITAR—which requires government pre-approval to place an item into the "public domain"—Subsection (c) allows "publication" with no pre-approval. 15 C.F.R. § 734.7(a); *supra* at 3–4. Once the files are "published," they are "not … subject to the EAR" and can be exported via any method *other* than "posting on the internet," including by email. 15 C.F.R. § 734.7(c); *see also* PI Order at 17 n.5. While "methods of export other than posting on the Internet" are indeed generally within Commerce's jurisdiction, Mot. at 22, *published* files are an exception. Commerce only retains jurisdiction over published files as provided in Subsection (c), which refers only to exports via internet posting. 15 C.F.R. § 734.7(c). Thus, files like DD's, which have already been "published," are deregulated *ab initio*. *See* 15 C.F.R. § 734.7(c). One could even advertise online that published "ready for insertion" files are available to anyone in the world, and then deliver those files via email. *See id.*

In short, Subsection (c)'s reservation of EAR jurisdiction over only "ready for insertion" files "made available by posting on the internet" renders its controls effectively meaningless. The rules contain no explanation for these self-defeating limitations[10]—presumably because the public had no opportunity to point them out to the agencies. *See infra* at 19–22. The Court should once again decline to credit Defendants' unsubstantiated assertion that the Commerce Rule "simply mimics what is currently the status quo under ITAR." PI Order at 17 n.5.

C. The State Rule Is Reviewable under the AECA

The Court correctly found that the Commerce Rule was the result of an "interagency effort," and that "joint actions"—i.e., the "companion" rules here—may be evaluated "to the extent that they are reflected in the decision to remove the 3-D gun files from the Munitions List." PI Order at 10–11. Even if Defendants are correct that the Commerce Rule is unreviewable in isolation, Mot. at 5–6, the Court may consider State's express reliance on purported Commerce controls (including Subsection (c)) to justify the transfer of 3-D firearms files. *See* State Rule at

[10] The declarations Defendants cite carry no weight, as litigation-driven explanations not included in the rule itself are "not properly before" the Court. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). Plaintiffs are unaware of any formal agency guidance or rule adopting those explanations.

3832. This Court also correctly concluded that the AECA's limitation on judicial review "does not apply to removals from the Munitions List." PI Order at 10–11. 22 U.S.C. § 2778(h) provides:

> The ***designation*** by the President (or by an official to whom the President's functions under subsection (a) have been duly delegated), in regulations issued under this section, of items ***as defense articles or defense services*** for purposes of this section shall not be subject to judicial review.

Id. (emphases added). Defendants' argument that "designation" of items "as" defense articles encompasses de-designations is unsupported by the statute's text or by judicial precedent.

There is a "strong presumption" in favor of judicial review of agency action. *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (citation and internal quotation marks omitted). Congress's precise and narrowly crafted exemption from judicial review is limited to the affirmative "designation" of items "as defense articles" under the AECA. 22 U.S.C. § 2778(h); *see Bernstein v. U.S. Dep't of State*, 945 F. Supp. 1279, 1289 (N.D. Cal. 1996) ("[T]he AECA makes the *initial designation* of items as defense articles unreviewable."). The decision to de-designate items as "no longer" defense articles does not fall within this language. In fact, every relevant reference to designation in Section 2778 concerns items placed on, not removed from, the Munitions List. *See* 22 U.S.C. § 2778 §§ (a), (a)(1), (b), (b)(1)(A)(i), (b)(1)(A)(ii)(I), (b)(2), (f)(5)(C), (h). This also comports with the plain meaning of "designate … as." Webster's defines "designate" in relevant part as "to indicate and set apart *for a specific purpose* …" (emphasis added).[11] The word is derived from the Latin "signum," which means "something that marks or identifies or represents."[12] The statute's structure also supports this view: Section 2778(f)(5)(C) defines "defense article" as "an item designated by the President pursuant to subsection (a)(1)." But a removed item is *not* a defense article. While the very act of removing an item from the Munitions List renders an item *not* a "defense article," such removal would, under Defendants' view that removal is a "designation," paradoxically make the item a "defense article."[13]

[11] "Designate." Merriam-Webster.com, https://tinyurl.com/y4zygc5o (last accessed Feb. 18, 2021).
[12] "Signum." Merrium-Webster.com, https://tinyurl.com/y2pd3ws9 (last accessed Feb. 18, 2021).
[13] Defendants' definition is also inconsistent with State's own regulations, *e.g.*, "Defense article means any item or technical data designated" pursuant to Section 2778. 22 C.F.R. § 120.6; *see id.* § 121.1.

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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Each of the cases Defendants cite is consistent with and supports this Court's prior ruling. *See* Dkt. #110 at pp. 7. In *United States v. Martinez*, the Eleventh Circuit stated that Section 2778(h) supported its conclusion that "the political question doctrine renders the propriety of an item's *placement on the Munitions List* a non-justiciable issue in Federal court," 904 F.2d 601, 601-03, 603 n.4 (1990) (emphasis added). Similarly, *Karn v. State* concerned a challenge to whether an item had been properly designated "*as* a defense article," and the court recognized that this particular decision was nonjusticiable. 925 F. Supp. 1, 3 (D.D.C. 1996). And *United States v. Pulungan* demonstrates that courts apply Section 2778(h) strictly according to its precise language. 569 F.3d 326, 328 (7th Cir. 2009). *Pulungan* also concerned designation "as" a defense article, rather than removal from the Munitions List. *Id.* at 327-28. The court carefully parsed the statutory language to conclude that a designation not made "in regulations" did not fall under Section 2778(h). *Id.* at 328. Congress's precise language limiting its exemption from review to designations "as" defense articles should be similarly respected.

Moreover, Congress's decision to preclude judicial review of designations, but not removals, makes good sense. As the cases above illustrate, the typical challenge to a designation decision will be from a regulated person or entity seeking to avoid a regulatory burden or to excuse noncompliance. To further the broad statutory goals of "world peace and the security and foreign policy of the United States," 22 U.S.C. § 2778(1)(a), Congress chose to make the initial designation decision discretionary—allowing for error on the side of regulation. By contrast, Congress's decision to permit judicial review of removals from the Munitions List reflected its intent to maintain an additional safeguard on such decisions. For similar reasons, Congress does not review designations of defense articles on the Munitions List, but placed its own direct check on removals, requiring 30 days' notice before State can remove an item. 22 U.S.C. § 2778(f)(1).[14] Again, the different treatment of designations versus removals evinces an intent

[14] This requirement furthers Congress's "particularly rigorous oversight of the Munitions List[.]" *United States v. Zheng*, 590 F. Supp. 274, 278-79 (D.N.J. 1984), *vacated on other grounds*, 768 F.2d 518 (3d Cir. 1985); *see also* H.R. Rep. No. 107-57, at 86-87 (2001) (Congress amended Subsection (f) in 2002 to strengthen the notice

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Complex Litigation Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

to privilege the goals of peace and security, by ensuring that removal is not undertaken for arbitrary or improper reasons. Had Congress intended otherwise, it could easily have included "removal" of items in the AECA's provision limiting judicial review. *See id.* It did not.

Defendants argue that Section 2778(f)(1)'s congressional notice requirement somehow weighs against judicial review. Citing no authority, they imply that Congress's review is *exclusive*. *See* Mot. at 8. But "[c]ongressional reporting requirements are, of course, legion in federal law." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 317 (D.C. Cir. 1988); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2602 (2019) (Alito, J., concurring in part and dissenting in part). "Generally, congressional reporting requirements are, and heretofore have been, a management tool employed by Congress for its own purposes." *Guerrero v. Clinton*, 157 F.3d 1190, 1196 (9th Cir. 1998) (quoting *Hodel*, 865 F.2d at 314); *Armstrong v. Bush*, 924 F.2d 282, 291-92 (D.C. Cir. 1991) ("[T]he fact that Congress retains some direct oversight over agencies' compliance with the [statute] does not necessarily indicate an intent to preclude judicial review."); *Common Cause v. Dep't of Energy*, 702 F.2d 245, 250 n.30 (D.C. Cir. 1983).

Nor does the cited legislative history support Defendants' position. Mot. at 8–9. First, because the plain language of Section 2778(h) is clear and precise, it is unnecessary to consult legislative history. *See, e.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011). Second, Congress added Subsection (f), which describes the President's removal authority and obligations, only a few years after the AECA's enactment, in response to industry concerns about overregulation. H.R. Rep. No. 97-58, at 21-22 (1981). That Congress believed the addition of Subsection (f) was necessary shows that, before such addition, the issue of whether removal was specifically authorized and must be considered was still an open question.[15] The House Report further stated that Subsection (f) "is consistent with past congressional actions to maintain

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requirements in response to perceived attempts to evade its oversight).

[15] It is *possible*, as Defendants argue, that the President had some implicit power to remove items from the Munitions List prior to the addition of Section 2778(f). *See* Mot. at 8–9. Even assuming he did, the contrived inference that Congress always viewed removal as "a subset of possible designations" would not follow. *See id.* As evidenced by the addition of 2778(f), Congress viewed "designation" and "removal" as separate processes.

prudent arms export controls *while contemplating* removal of items from the munitions list which should no longer be considered defense articles for purposes of this section." *Id.* at 22 (emphasis added). Defendants misread this sentence to mean that "past congressional actions" already contemplated removal. Mot. at 9. But this makes no sense because, as Defendants acknowledge, "[a]s originally enacted, § 2778 made no mention of removals from the USML[.]" *Id.* at 8. Rather, the phrase "while contemplating" is a comparative conjunction setting off "past congressional actions" from what was *added* to the statute: the President's new express Subsection (f) authority.[16] *Cf.* H.R. Rep. No. 97-58, at 22 (emphasizing that Subsection (f) does not *require* removal of "any items"). In sum, Section 2778(f)(1) makes explicit what was previously implicit: "designation … of items as defense articles," and subsequent removal of designated items from the Munitions List, are two different types of action.

Finally, if there is any ambiguity in Section 2778(h), the strong presumption of judicial review requires the narrower construction. *See ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). State's removal of 3-D gun files from the Munitions List is reviewable.

D. Defendants' Standing and Political Question Challenges Fail

This Court has rejected Defendants' meritless standing arguments multiple times now. *See* PI Order at 7 ("The Court agrees with the States that the analysis is no different here than it was in *State of Washington*."). Those arguments fail yet again for the same reasons as before.

Deregulating 3-D firearms files in a manner that permits them to be posted publicly on the internet—thus making them readily and *universally* available both domestically and abroad—will damage the States' sovereign, quasi-sovereign,[17] and proprietary interests in enforcing their gun-safety laws; ensuring the safety and security of their residents and visitors; and protecting

[16] *See, e.g.*, "While." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/while (last accessed Feb. 18, 2021) (defining "while" as "similarly and at the same time that").

[17] The Court need not reach Defendants' objection to the States' standing to vindicate their quasi-sovereign (*parens patriae*) interests, Mot. at 14, because harms to the States' sovereign and proprietary interests establish injury in fact. But it is questionable whether the *Mellon* bar applies to statutory (as opposed to constitutional) claims, like those at issue here. *See generally New York v. U.S. Dep't of Labor*, 477 F. Supp. 3d 1, 9 n.6 (S.D.N.Y. 2020).

their treasuries, borders, and state facilities. PI Order at 8–9; Dkt. # 55 at 22–24 & cited declarations (describing harms to state interests). The purported lack of a causal connection between export-control deregulation and the States' domestic concerns, *see* Mot. at 14–15, is "so myopic and restrictive as to be unreasonable." PI Order at 8. A "relaxed" traceability analysis is not needed: there is a straight line between federal deregulation and harm to the States. *Contra* Mot. at 14–15. As before, when 3-D firearm files are subject to effective export-control regulations, States are spared the "proliferation of untraceable and undetectable weapons, assassinations, aviation and other security breaches, and violations of gun control laws both abroad and at home." *Washington*, 318 F. Supp. at 1255. Such concerns are far from "speculative" or "attenuated," Mot. at 13–15: as explained above, Commerce's purported retention of jurisdiction is easily circumvented with a few clicks of a computer mouse. *Supra* at III.B.

The conclusory assertion that *some* files are available *somewhere* on the internet, Mot. at 13–14, does not demonstrate a lack of injury or redressability. *See Washington I*, 318 F. Supp. at 1262 ("[T]he possibility that a cybernaut with a BitTorrent protocol will be able to find a file in the dark or remote recesses of the internet does not make the posting to Defense Distributed's site harmless."). In fact, if 3-D firearms files were widely available online, there would be little sense in Commerce purporting to continue regulating their internet posting. Likewise, "[t]he states need not have already suffered … harm" to have standing. *California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018); *contra* Mot. at 14.[18] "An allegation of future injury may suffice if … there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Such risks are well established by the evidence here. *See* Mot. at 22–24 & cited evidence.

Defendants' invocation of the political question doctrine (which they abandoned on their appeal of this Court's preliminary injunction) is likewise meritless. Mot. at 10–13. This Court

[18] In fact, State itself represented in court in 2018 that 3-D firearms files could be "easily used overseas to make firearms that are subject to U.S. export controls," where, "beyond the reach of U.S. law [which makes possession of undetectable firearms illegal, 18 U.S.C. § 922], they could be used to threaten U.S. national security, U.S. foreign policy interests, or international peace and stability." Ex. C.

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800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

already correctly rejected Defendants' attempt to reframe this case as a policy dispute, when in fact the parties *agree* that dissemination of 3-D firearms files would threaten national security, and the States are merely challenging the agencies' failure to comply with the APA. PI Order at 9–10; *see, e.g.*, *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 827 (9th Cir. 2017) (recognizing duty of courts to uphold statutory mandates, even in areas touching upon national security or foreign affairs). The Court should make the same finding here.

Nor do the States fall outside the relevant zone of interests. *See* PI Order at 9. The zone of interests test for claims brought under the APA's judicial review provision is "lenient," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014), and is satisfied if the plaintiff's interests are "arguably" protected. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). As the Court previously found, the "States' interests in curbing violence, assassinations, terrorist threats, aviation and other security breaches, and violations of gun control laws within their borders is at least marginally related to the national security interests protected or regulated by the AECA and the ECRA." PI Order at 9 (citing 22 U.S.C. § 2778(a)(1); 50 U.S.C. § 4811. The Court should again reject Defendants' effort to sever "national security" from "domestic security," which are at least overlapping, if not coextensive.

E. The State Rule Violates the APA and Must Be Vacated

Having failed to substantiate their challenges to this Court's jurisdiction, Defendants unsurprisingly have little to say on the merits. The agency actions here blatantly violate the APA's notice-and-comment requirements, and are also arbitrary, capricious, and contrary to the AECA.

1. The rulemaking violated notice-and-comment requirements

The APA requires agencies to provide public notice and an opportunity to comment on proposed rules. 5 U.S.C. § 553(b)(3), (c). "A decision made without adequate notice and comment is arbitrary or an abuse of discretion" as a matter of law. *Nat. Res. Def. Council v. U.S. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). Here, as the Court has already found, "neither agency gave any indication that a specific regulation would apply to the online dissemination of 3-D gun files,"

the final rules came "out of left field," and this error was not "harmless." PI Order at 12–15. Defendants' arguments to the contrary fail for the same reasons as before. *See* Mot. at 17–18.[19]

Defendants continue to insist that notice was adequate because the proposal to remove small-caliber firearms and related technical data from the Munitions List "would necessarily include" 3-D gun files. Mot. at 17. But even when the components of a rule "are technically present" in the proposed rule, notice is deficient where it "obscures the intent of the agency and allows for broad [impacts] through the back door." *Louis v. U.S. Dep't of Labor*, 419 F.3d 970, 975–76 (9th Cir. 2005) (agencies may not omit information about the rule's specific intended application so as to allow "potentially controversial subject matter … to go unnoticed buried deep in a non-controversial publication"). Here, the NPRMs failed to mention 3-D gun files even though they were published to effectuate an (as-yet-undisclosed) Settlement Agreement that pertained *specifically* to those items. *Supra* at 6–7; *contra* Mot. at 17. That some sophisticated commenters discerned that the NPRMs would deregulate 3-D gun files, *see id.*, does not render the process fair or adequate: the Government cannot "bootstrap notice from a comment." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1378 (Fed. Cir. 2017). While comments "may be relevant to the court's inquiry under the logical outgrowth doctrine," here, none of the referenced comments addressed Subsection (c)—because they could not, as there was no notice of that provision. *See id.* (finding no logical outgrowth where comments were "entirely silent" on an issue of which no notice was provided).

[19] Defendants' re-invocation of the APA's "foreign affairs exception" once again fails to support their position that the rulemaking at issue is exempt from notice-and-comment requirements. This threshold issue has been thoroughly briefed and decided and need not be revisited yet again. *See* Dkt. # 87 at 8–9; PI Order at 11–12 (finding the exception does not apply as a matter of law). Defendants do not even address the applicable standard: that the exception only applies where "public rulemaking provisions would provoke definitely undesirable international consequences." PI Order at 11 (citing H. Rep. No. 1980, 69th Cong., 2d Sess. 23 (1946); *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980)). Here, of course, a "public rulemaking" (albeit not one that disclosed its impact on 3-D firearms files) has already occurred. Finally, Defendants' extraordinary claim that Congress "ratified" *all* of the State Department's regulations and interpretations merely by reenacting the general export control statute is inconsistent with the presumption of judicial review, and has no support in case law. *See* Mot. at 16; *cf. Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (concluding Congress intended to ratify agency definition based on *specific evidence* in the legislative record of its awareness of and assent to the definition).

An ordinary interested member of the public would not have understood that the NPRMs could lead to the dissemination of 3-D firearms files. For example, the stated rationale for the NPRMs—that the transferred items are "widely available in retail outlets"—does not apply to such files. *Supra* at 6–7; *see Louis*, 419 F.3d at 976 (NPRM's header and summary should help "alert[] a reader to the stakes"); *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. C 08-2649 CW, 2009 WL 185423, at *7 (N.D. Cal. Jan. 20, 2009) ("Given the actual impact of the new rule, the notice was patently misleading.") (quoting *Nat. Res. Def. Council, Inc. v. Hodel*, 618 F. Supp. 848, 874 (E.D. Cal. 1985)). This explicit limitation further obscured the agencies' actual, but undisclosed, intent to deregulate 3-D firearms files, which are not widely available in retail outlets. Also, the Commerce NPRM misleadingly claimed that the proposal "does not deregulate the transferred items," even though the self-executing "publication" loophole does exactly that. *See supra* at 7;. The Commerce NPRM addressed the "publication" jurisdictional exception only as applied to the innocuous example of an operations manual. *Id.* But under the rules as proposed (which did not include any purported retention of jurisdiction similar to Subsection (c) of the final Commerce Rule), 3-D gun files would have been deregulated entirely.

In fact, the final Commerce Rule "all but acknowledges" that the framework described in the NPRMs "did not 'adequately address'" issues specific to 3-D firearms files. PI Order at 13 n.3 (quoting Commerce Rule at 4142). 3-D firearms files uniquely facilitate the near-automatic production of untraceable, undetectable, deadly weapons, and their digital form makes them readily transmittable. Therefore, unlike ordinary small-caliber firearms one could lawfully purchase from a retailer (or "technical data" like an operations manual), 3-D firearms files pose unique threats to national security and public safety. As Defendants now agree, 3-D gun files "could be easily used in the proliferation of conventional weapons, the acquisition of destabilizing numbers of such weapons, or for acts of terrorism" across the globe and in the United States. Commerce Rule at 4140. The final rules are the product of unilateral agency action that was never "tested via exposure to diverse public comment," *Int'l Union, United Mine Workers of Am. v.*

Mine Safety & Health Admin., 626 F.3d 84, 95 (D.C. Cir. 2010). A new round of notice-and-comment would provide the "first opportunity" for *any* public input on Subsection (c), and for meaningful public input on the jurisdictional transfer relating to 3-D firearms files more generally. *NRDC*, 279 F.3d at 1186. This alone renders the removal of the files from the Munitions List procedurally defective and warrants vacatur.

2. The rulemaking was arbitrary and capricious

The administrative record reveals that Subsection (c) was added to the Commerce Rule just weeks before final publication. *Supra* at 8. The administrative record contains *no explanation whatsoever* for why Defendants only chose to retain jurisdiction over published 3-D gun files "made available by posting on the internet," but not those exported by other means; and only over files in a format "such as AMF or G-code" that "is ready for insertion" into a 3D printer but not files that can be converted to AMF-type files within minutes.[20] *Supra* at 9–10. These are unexplained departures from prior policy, *contra* Mot. at 21–22—and moreover, they were irrational in light of the stated policy purpose to control the files' global dissemination. *See supra* at 11–13. Because State expressly and erroneously relied on the effectiveness of the Commerce regime as applied to 3-D firearms files, State's rationale for transferring the files to Commerce was arbitrary and capricious. *See, e.g.*, State Rule at 3823 (concluding that the new EAR regulations would "sufficiently address" national security concerns).

Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Reviewing courts must not substitute their judgment

[20] As noted above, *supra* at 12, Commerce now suggests that the "ready for insertion" language is intended to capture only CAM file types and not CAD files. Even if this were otherwise a sufficient explanation, which it is not, Commerce's *post-hoc* litigation declarations may not, as a matter of law, support Defendants' rules without a new round of rulemaking. *See Regents*, 140 S. Ct. at 1909. Moreover, the decision to exclude CAD files is arbitrary for reasons explained above.

for the agency's, but "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotation omitted). Courts must hold unlawful and set aside rulemaking that fails to meet these standards. 5 U.S.C. § 706(2)(A).

Here, all parties acknowledge that 3-D firearms files pose a national security threat. The agencies purport to agree with "concerns raised over the possibility of widespread and unchecked availability of 3-D printing technology and software, the lack of government visibility into production and use, and the potential damage to U.S. counter-proliferation efforts." State Rule at 3823; *see* Commerce Rule at 4141, 4142. The AECA requires State to consider these factors when deciding whether to remove items from the Munitions List. *See* 22 U.S.C. § 2778(a)(1); *State Farm*, 463 U.S. at 55 (agency must consider factors "Congress intended" it to consider). Yet State's decision to remove 3-D firearms files from the Munitions List was not designed to further national security: the asserted basis for the de-listing is that the files "do not confer a critical military or intelligence advantage and are not inherently military based on their function." State Rule at 3823; Mot. at 19. This is inadequate: although munitions articles that confer a "military or intelligence advantage" "shall be" included on the Munitions List, they are not the *only* items that can be included. PI Order at 16 (citing 22 C.F.R. § 120.3(b)); *see Washington*, 420 F. Supp. 3d at 1144 (State may not evaluate export controls "only through the prism of whether restricting foreign access would provide the United States with a military or intelligence advantage"). The "rational connection" between the "facts found" (that 3-D firearms files threaten national security) and the "choice made" (removing 3-D firearms files from the Munitions List) is missing.

State cannot rehabilitate its inadequate rationale by claiming it "took into account" the jurisdictional transfer's effects on U.S. national security and foreign policy interests. State Rule at 3823. Such perfunctory statements fail to give any notion of *how* these important issues were accounted for—and in reality, the Commerce Rule, for no reason apparent from the record, fails to establish any meaningful control over 3-D firearms files. *Supra* at 11–13. "Stating that a factor

was considered … is not a substitute for considering it." *Beno v. Shalala*, 30 F.3d 1057, 1075 (9th Cir. 1994); *see also Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), *cert. granted,* 20-37, 2020 WL 7086046 (U.S. Dec. 4, 2020), and *cert. granted sub nom. Arkansas v. Gresham*, 20-38, 2020 WL 7086047 (U.S. Dec. 4, 2020) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). For similar reasons, the State Rule is arbitrary and capricious because it fails to explain the reversal of its position that 3-D firearms files should be ITAR-controlled, and provides no "good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Justifying such a policy reversal requires the agency to "do more than simply announce a contrary position." *Id.* at 515–16. The administrative record is devoid of *any* rationale for why removing 3-D firearms files from the Munitions List is somehow "consistent with the AECA's goals of world peace, national security, and U.S. foreign policy." PI Order at 17.

3. The rulemaking is contrary to the AECA

For similar reasons, the State Rule violates the AECA. PI Order at 18. "'[I]n order to be valid [regulations] must be consistent with the statute under which they are promulgated.'" *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018) (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977)). Courts must not "rubber-stamp" rules "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *A.T.F. v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97 (1983). Again, the AECA requires State to maintain the Munitions List "[i]n furtherance of world peace and the security and foreign policy of the United States" by reducing the international trade in arms. 22 U.S.C. §§ 2751, 2778(a)(1). Transferring jurisdiction over 3-D firearms files to an agency that lacks the power to meaningfully control them is contrary to the AECA's purposes and lacks any coherent rationale. PI Order at 18.

IV. CONCLUSION

For the reasons above, the Court should vacate Defendants' unlawful actions and order that 3-D firearms files remain on the U.S. Munitions List.

DATED this 19th day of February, 2021.

ROBERT W. FERGUSON
Attorney General of Washington

s/ Kristin Beneski
KRISTIN BENESKI, WSBA #45478
BRENDAN SELBY, WSBA #55325
Assistant Attorneys General
JEFFREY RUPERT, WSBA #45037
Division Chief
(206) 464-7744
kristin.beneski@atg.wa.gov
brendan.selby@atg.wa.gov
jeffrey.rupert@atg.wa.gov
Attorneys for Plaintiff State of Washington

XAVIER BECERRA
Attorney General of California

/s/ John W. Killeen
JOHN W. KILLEEN
Deputy Attorney General
(916) 210-6045
John.killeen@doj.ca.gov
Attorneys for Plaintiff State of California

PHILIP J. WEISER
Attorney General of Colorado

/s/ Grant T. Sullivan
GRANT T. SULLIVAN
Assistant Solicitor General
(720) 508-6349
Grant.sullivan@coag.gov
Attorneys for Plaintiff State of Colorado

WILLIAM TONG
Attorney General of Connecticut

/s/ Maura Murphy Osborne
MAURA MURPHY OSBORNE
Assistant Attorney General
KIMBERLY MASSICOTTE

JOSEPH RUBIN
(860) 808-5318
Attorneys for Plaintiff State of Connecticut

KATHLEEN JENNINGS
Attorney General of Delaware

s/ Christian Douglas Wright
CHRISTIAN DOUGLAS WRIGHT
Director of Impact Litigation
JILLIAN A. LAZAR
DAVID J. LYONS
Deputy Attorneys General
(302) 577-8400
Christian.wright@deleware.gov
Jillian.lazar@delaware.gov
David.lyons@deleware.gov
Attorneys for Plaintiff State of Delaware

KARL A. RACINE
Attorney General of the District of Columbia

/s/ Kathleen Konopka
KATHLEEN KONOPKA
Deputy Attorney General, Public Advocacy Division
ANDREW J. SAINDON
Senior Assistant Attorney General
(202) 741-0770
Andy.saindon@dc.gov
Attorneys for Plaintiff District of Columbia

CLARE E. CONNORS
Attorney General of Hawaii

s/ Robert T. Nakatsuji
ROBERT T. NAKATSUJI
Deputy Attorney General
(808) 586-1360
Robert.t.nakatsuji@hawaii.gov
Attorneys for Plaintiff State of Hawaii

KWAME RAOUL
Attorney General of Illinois

/s/ Kathryn Hunt Muse
KATHRYN HUNT MUSE
Deputy Chief, Public Interest Division
DARREN KINKEAD
Assistant Attorney General
(312) 814-3000
kmuse@atg.state.il.us
dkinkead@atg.state.il.us
Attorneys for Plaintiff State of Illinois

AARON M. FREY
Attorney General of Maine

/s/ Susan P. Herman
SUSAN P. HERMAN
Chief Deputy Attorney General
(207) 626-8814
susan.herman@maine.gov
Attorneys for Plaintiff State of Maine

BRIAN E. FROSH
Attorney General of Maryland

/s/ Jeffrey P. Dunlap
JEFFREY P. DUNLAP
STEVEN M. SULLIVAN
(410) 576-6325
ssullivan@oag.state.md.us
jdunlap@oag.state.md.us
Attorneys for Plaintiff State of Maryland

MAURA HEALEY
Attorney General of Massachusetts

/s/ Phoebe Fischer-Groban
PHOEBE FISCHER-GROBAN
Assistant Attorney General
(617) 727-2200
Phoebe.fischer-groban@state.ma.us
Attorneys for Plaintiff Commonwealth of Massachusetts

DANA NESSEL
Attorney General of Michigan

/s/ Joseph T. Froehlich
JOSEPH T. FROEHLICH
Assistant Attorney General
(517) 335-7573
Froehlichj1@michigan.gov
Attorneys for Plaintiff State of Michigan

KEITH ELLISON
Attorney General of Minnesota

/s/ Jacob Campion
JACOB CAMPION
Assistant Attorney General
(651) 757-1459
Jacob.campion@ag.state.mn.us
Attorneys for Plaintiff State of Minnesota

GURBIR S. GREWAL
Attorney General of New Jersey

/s/ Glenn J. Moramarco
GLENN J. MORAMARCO
Assistant Attorney General
(609) 376-3235
Glenn.moramarco@law.njoag.gov
Attorneys for Plaintiff State of New Jersey

HECTOR BALDERAS
Attorney General of New Mexico

/s/ Nicholas M. Sydow
NICHOLAS M. SYDOW
Civil Appellate Chief
(505) 717-3571
nsydow@nmag.gov
Attorneys for Plaintiff State of New Mexico

LETITIA JAMES
Attorney General for New York

/s/ Matthew Colangelo
MATTHEW COLANGELO
Chief Counsel for Federal Initiatives
DANIELA NOGUEIRA
Assistant Attorney General
STEVEN C. WU
Deputy Solicitor General
(212) 416-6057
Matthew.colangelo@ag.ny.gov
Daniela.Nogueira@ag.ny.gov
steven.wu@ag.ny.gov

Attorneys for Plaintiff State of New York

JOSHUA H. STEIN
Attorney General of North Carolina

/s/ Sripriya Narasimhan
SRIPRIYA NARASIMHAN
Deputy General Counsel
SNarasimhan@ncdoj.gov
Attorneys for Plaintiff State of North Carolina

ELLEN F. ROSENBLUM
Attorney General of Oregon

/s/ Carla Scott
CARLA SCOTT
Senior Assistant Attorney General
(971) 673-1915
carla.a.scott@doj.state.or.us
MICHAEL KRON
Special Counsel
(503) 378-4400
Michael.c.kron@doj.state.or.us
Attorneys for Plaintiff State of Oregon

JOSHUA SHAPIRO
Attorney General of Pennsylvania

s/ Jacob B. Boyer
JACOB B. BOYER
Deputy Attorney General
MICHAEL J. FISCHER
Chief Deputy Attorney General
(215) 560-2171
jboyer@attorneygeneral.gov
mfischer@attorneygeneral.gov
Attorneys for Plaintiff Commonwealth of Pennsylvania

PETER F. NERONHA
Attorney General of Rhode Island

/s/ Justin J. Sullivan
JUSTIN J. SULLIVAN
Special Assistant Attorney General
(401) 274-4400 ext. 2007
jjsullivan@riag.ri.gov
Attorneys for Plaintiff State of Rhode Island

T.J. DONOVAN
Attorney General of Vermont

/s/ Benjamin D. Battles
BENJAMIN D. BATTLES
Solicitor General
(802) 828-5944
Benjamin.battles@vermont.gov
Attorneys for Plaintiff State of Vermont

MARK R. HERRING
Attorney General of Virginia

/s/ Samuel T. Towell
SAMUEL T. TOWELL
Deputy Attorney General, Civil Litigation
(804) 786-2071
STowell@oag.state.va.us
Attorneys for Plaintiff Commonwealth of Virginia

JOSHUA L. KAUL
Attorney General of Wisconsin

s/ Brian P. Keenan
BRIAN P. KEENAN
Assistant Attorney General
(608) 266-0020
keenanbp@doj.state.wi.us
Attorneys for Plaintiff State of Wisconsin

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to all counsel of record.

DATED this 19th day of February 2021, at Seattle, Washington.

s/ Kristin Beneski
KRISTIN BENESKI, WSBA #45478
Assistant Attorney General